

ECF No. 556-6

Exhibit D

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI**

SCOTT AND RHONDA BURNETT, RYAN
HENDRICKSON, JEROD BREIT, SCOTT
TRUPIANO, and JEREMY KEEL, on behalf
of themselves and all others similarly situated,

Plaintiffs,

v.

THE NATIONAL ASSOCIATION OF
REALTORS, REALOGY HOLDINGS
CORP., HOMESERVICES OF AMERICA,
INC., BHH AFFILIATES, LLC, HSF
AFFILIATES, LLC, RE/MAX LLC, and
KELLER WILLIAMS REALTY, INC.,

Defendants.

Case No.: 4:19-cv-00332-SRB

Judge Stephen R. Bough

DECLARATION OF JAMES DOHR

I, James Dohr, state as follows:

1. I am the President of NRT Missouri LLC dba Coldwell Banker Realty-Gundaker and dba Laura McCarthy Real Estate (collectively “CB Gundaker”).

2. I am over the age of 18, am competent to testify to the matters stated herein, and make this declaration based upon my personal knowledge, information, and belief.

3. CB Gundaker is a wholly owned subsidiary of Coldwell Banker Residential Brokerage LLC, which is indirectly wholly owned by Defendant Realogy Holdings Corp. (“Realogy”). CB Gundaker, headquartered in St. Louis, Missouri, is a residential real estate brokerage company. It provides residential real estate services to sellers and buyers to assist them

with their residential real estate purchase and sale transactions, primarily in the St. Louis and east-central Missouri area.

4. CB Gundaker traces its roots in Missouri to the initial founding of Ira E. Berry Real Estate in 1939, which was acquired by Coldwell Banker in 1985. NRT Inc., a subsidiary of Realogy Holdings Corp., acquired Gundaker Realtors in 2001 and combined the former Coldwell Banker Ira E. Berry operations with Gundaker Realtors to form CB Gundaker.

5. With its rich Missouri history, CB Gundaker has won many professional awards, and is proud to have been recognized as one of the best places to work in St. Louis.

6. In addition to helping tens of thousands of Missourians achieve the dream of home ownership, CB Gundaker is deeply invested in giving back to the community in other ways. Indeed, CB Gundaker and its local offices have hosted numerous charity events to benefit Ronald McDonald House Charities over the years and CB Gundaker has raised more than \$2 million for this important cause.

7. Realogy is a holding company that owns brokerages and licenses the following brands to independently owned franchisee brokerages: Better Homes and Gardens Real Estate LLC, Century 21 Real Estate LLC, Coldwell Banker Real Estate LLC, ERA Franchise Systems LLC, and Sotheby's International Realty Affiliates LLC. With respect to franchisees, I understand that Realogy licenses its right to use its trademarks, but each franchisee is independently owned and operated, and is free to adopt its own operational policies, guidelines, and training materials, including with respect to commissions.

8. Most home sellers in the United States list their houses for sale on a multiple listing service (MLS) in order to share information about the home. An MLS is a database of

homes listed for sale in a particular area that allows real estate professionals to share and identify homes for sale.

9. CB Gundaker is Realogy's only company-owned brokerage that operates within the areas covered by the following multiple listing services ("MLSs"): the Heartland MLS, the Columbia Board of Realtors, the Mid America Regional Information System ("MARIS"), and the Southern Missouri Regional MLS (collectively, the "Subject MLSs"). Within the Subject MLSs, CB Gundaker operates only in the MARIS geography.

10. I have worked in the real estate industry since 1977 and have been a licensed broker for more than three decades. Throughout that time, I have worked in various capacities, including finance and management, for real estate brokerages. From 2003 to 2006, I served as Chief Operating Officer of CB Gundaker, and in 2007 I became President of CB Gundaker, which remains my current position.

11. Based on my experience spanning more than 35 years in residential real estate in Missouri, I am personally familiar with residential real estate transactions including negotiations between agents and their clients. Although every real estate transaction is unique, I am familiar with the practices of independent contractor sales agents with respect to listing residential properties for sale on MARIS. I am also familiar with respect to the practices of independent contractor sales agents representing buyers. I am familiar with the manner in which agents are compensated by their clients, including how that compensation is negotiated between agents and their clients.

12. CB Gundaker currently has fifteen (15) sales field offices in Missouri counties within the St. Louis metropolitan area, including fourteen (14) offices operating under the dba "Coldwell Banker-Gundaker" and one (1) operating as "Laura McCarthy Real Estate." Those

offices collectively have approximately 70 employees and over 1,400 independent contractor sales associates affiliated with them. As President of CB Gundaker, I work with managers and independent contractor sales associates who are affiliated with CB Gundaker.

13. Sales associates are not employees of CB Gundaker, but rather are independent contractors who are licensed by the State of Missouri as real estate professionals. The independent contractor sales associates affiliated with CB Gundaker work to provide services as buyers' and sellers' agents in residential real estate transactions. All real estate professionals licensed in Missouri, including independent contractor sales associates affiliated with CB Gundaker, must comply with continuing education requirements to maintain their licenses, among other requirements.

14. Independent contractor sales associates affiliated with CB Gundaker are responsible for negotiating listing commissions and offers of compensation to buyer brokers, and for negotiating the actual cooperative compensation ultimately paid to the buyer brokers who successfully present buyers who consummate home purchases. Realogy does not have control over those activities of the independent contractors affiliated with CB Gundaker. I understand that the same is true regarding the independent contractor sales associates who are affiliated with other Realogy-owned brokerages. I understand the same is also true regarding the independent contractor sales associates who are affiliated with franchisees that license a Realogy brand.

15. I am aware that some CB Gundaker employees, and all independent contractor sales associates affiliated with CB Gundaker, are members of the National Association of Realtors ("NAR"). I also understand that many of the same people are members of the MARIS MLS, which is the MLS that serves the St. Louis metropolitan area.

16. In my current executive role as President of CB Gundaker, I also work closely with Realogy's corporate staff. I have personal knowledge of the policies that Realogy requires Coldwell Banker's wholly owned subsidiaries to follow, and I am responsible for ensuring that CB Gundaker complies with such policies.

Realogy's Policies with Respect to NAR

17. Realogy is not a member of NAR or of any NAR owned or governed MLS, including the four MLSs that operate in Missouri. Realogy does not control NAR's rules—or even necessarily agree with all of NAR's rules and policies. Realogy does not have the ability to require NAR to create new rules. Nor does Realogy have the ability to require NAR to modify or eliminate existing NAR rules.

18. To my knowledge, Realogy does not require CB Gundaker, any company-owned brokerage, any subsidiary, or any independently owned and operated franchisee to join NAR, to join any local MLS, or to comply with NAR's Handbook on Multiple Listing Policy. Realogy does not direct CB Gundaker to adhere to any NAR rule with respect to MLS participation, commissions, or offers of compensation to buyer brokers.

19. Of the various NAR rules, guidelines and handbooks, the only set of rules that I am aware of that Realogy requires its brokerages and franchisees that license a Realogy brand to follow is the NAR Code of Ethics.

20. As a trade association serving the industry, I am aware that NAR also publishes a Handbook on Multiple Listing Policy. I am aware that the Handbook requires that in order to list a home for sale on an MLS, the listing must specify the compensation being offered to the buyer broker (the "Cooperative Compensation Rule"). This practice is also known as making an offer of compensation to the buyer broker. To the best of my knowledge, Realogy does not require

any company-owned brokerage, franchisee that licenses a Realogy brand, or independent contractor sales associate affiliated with any company-owned brokerage or franchisee that licenses a Realogy brand to comply with Section G-1.

21. In my experience, offering to compensate the buyer broker who ultimately presents the buyer who successfully purchases a home fairly ensures that the seller's home attracts the interest of qualified buyers, and that may result in a quicker sale. Even if the NAR Cooperative Compensation Rule were eliminated, CB Gundaker would continue to advise listing brokers and agents to recommend that sellers offer compensation to buyers brokers, as a type of finders' fee, to incentivize brokers and agents representing buyers to search for and present qualified buyers.

Realogy's Policies with Respect to MLS Participation

22. Listing a seller's home for sale on an MLS is a common strategy for listing agents that can provide significant benefits to sellers. By listing homes on an MLS, a listing agent makes it easier for buyer agents and brokers to find out that the home is for sale and obtain important details about the property, such as the list price, address, number of bedrooms and bathrooms, year of construction, square footage, etc. By sharing information about the house to be sold via an MLS, a listing agent is thus able to maximize the home's exposure to potential buyers, with the goal of increasing the likelihood of successfully finding a buyer to purchase the home. Listing a house on an MLS is beneficial to most sellers; most sellers want to sell their house quickly and at the highest price a buyer will offer.

23. In some instance sellers do not want to list their home on the MLS. They may not want their neighbors to know of a change in personal circumstances necessitating a sale, for example. Because the interests of the client are paramount, CB Gundaker does not require

agents to list homes on the MARIS MLS. To withhold their listings from the MARIS MLS, agents need only complete the MARIS Exemption Form: Authorization to Withhold Property Listing From MLS.

24. If a home is not listed on an MLS, the listing agent need not state the amount of compensation the seller is willing to offer to the buyer broker when they are advertising the home for sale. In such a case, the buyer agent, will frequently engage in discussions with the listing agent as to whether the seller will offer compensation to the buyer broker. In a circumstance in which the listing agent intends to provide cooperative compensation that is less than the buyer broker believes would appropriately remunerate the value of the buyer agent's services, the buyer broker (or agent) may have a follow up conversation with the buyer about an appropriate amount of payment from the buyer to the buyer broker.

25. If a house is listed on a NAR owned or governed MLS, including the MARIS MLS, my understanding is that pursuant to the Cooperative Compensation Rule, the listing must state how much compensation the seller is offering to the buyer broker who ultimately presents the buyer who successfully consummates the transaction. The offer of cooperative compensation can be stated as a percentage of the purchase price of the home or as a fixed dollar amount. The amount of compensation offered to the buyer broker, however, is subject to negotiation between each listing agent and his/her represented seller.

26. For home sales on the MARIS MLS, I understand that each seller is free to offer any level of compensation he or she chooses to the buyer broker, including no compensation at all.

CB Gundaker Seller Services and Commissions

27. In my experience and in transactions that I have handled and observed for more than three decades, individual sellers have myriad distinct strategies, preferences, and needs that require brokerage services tailored to each individual seller. No two real estate transactions are the same.

28. Prior to undertaking work on behalf of sellers, independent contractor sales associates affiliated with CB Gundaker negotiate the terms of representation with the sellers and, with their responsible broker's approval, CB Gundaker enters into written agreements with sellers known as listing agreements. Listing agreements are contracts that memorialize the terms and conditions of the listing broker's representation to which the seller and the listing agent have agreed.

29. In listing agreements, the listing brokerage commits to making a reasonable and diligent effort to find a buyer for the seller's house at the price and on the terms stated in the listing agreement. As part of this commitment, listing agents may provide their sellers with a variety of services, dependent on each seller's unique needs, such as recommending repairs where appropriate before a seller lists a home, evaluating comparable home sales and advising sellers if their price expectations are reasonable, and developing a strategy to sell the home on the seller's preferred timeline.

30. Prior to entering into listing agreements, sellers typically discuss the terms of the listing agreement with their listing agent, and often raise concerns about, and negotiate, any terms they find objectionable until they get to a point where the terms in the listing agreement are mutually acceptable.

31. Common terms that listing agents discuss and negotiate with sellers prior to signing a listing agreement include (i) the overall commission to be paid to the listing agent, (ii) the amount of compensation the listing agent will offer to the buyer broker who is ultimately successful in presenting a buyer, (iii) whether the listing agreement is exclusive, and if so, for what duration, (iv) whether the seller will offer a home warranty to the buyer, and (v) the price at which the agent will list the seller's house.

32. A variety of factors may affect the listing commission that sellers negotiate, or whether they choose to use a broker at all in selling their homes. In my experience and in transactions I have observed, some sellers place a high value on, and are willing to pay a premium listing commission for, an agent who, among other things: (i) is familiar with a neighborhood, (ii) has recent experience selling comparable houses, (iii) has a record of negotiating prices that are acceptable to the seller for comparable houses, (iv) has a record of selling homes within the seller's preferred time frame, and/or (v) is willing to provide the range of services in selling a home that is sought by that particular seller. Other sellers prefer a more limited range of services from their agent, and accordingly, seek a reduced listing commission. The relative importance of the above factors may lead to different listing commission even for comparable homes and is impossible to predict without a detailed understanding of each seller's unique preferences and the circumstances in which the home is being sold.

33. Regarding listing commissions charged by different brokerages within an overlapping geographic area, other factors that may affect the amount of listing commissions include (i) each brokerage's different policies regarding listing commissions and offers of cooperative compensation, (ii) the different broker and agent strategies with respect to selling a residential property, (iii) a property's time on the market, and (iv) different local conditions in

each neighborhood, including with respect to differences in sales price, and local conditions as to listing commissions and buyer broker compensation.

34. CB Gundaker's practice is that listing agreements provide that sellers generally do not owe any commission to their listing agents if their home is not sold (although CB Gundaker may be entitled to recoup commissions in certain contractual circumstances). Thus, it is entirely possible—indeed, common—for listing agents to spend many hours working for home sellers for which they are ultimately uncompensated, such as when no buyer makes an offer that is acceptable to the seller, the seller decides to hire another agent, or the seller decides not to move.

35. Although CB Gundaker has a form listing agreement, which it makes available to independent contractor sales agents affiliated with it, that includes a [REDACTED] listing commission, that listing commission is often negotiated with the seller. CB Gundaker has no mandatory requirement regarding the amount of listing commissions other than, absent prior approval, [REDACTED] [REDACTED] that applies to most transactions. As a result, listing agents have charged on a percentage basis commissions as low as 4% or as high as 10% when representing sellers of residential properties. Listing agents have also charged flat fees when representing sellers.

36. CB Gundaker has no policy requiring the amount of compensation to be offered to the buyer broker. CB Gundaker does not pre-populate any specific level of buyer broker compensation on its form listing agreement.

37. All sellers who work with CB Gundaker listing agents must identify how much the seller will offer the buyer broker in compensation in the listing agreement, which is entered at the outset of their representation by CB Gundaker. This practice ensures that sellers understand that compensation will be offered to the successful buyer broker from the listing

broker, and that the seller has specifically agreed with his/her listing agent about what that offer of compensation to buyer brokers will be. Thus, independent contractor sales associates affiliated with CB Gundaker cannot include an offer of compensation to a buyer broker in an MLS listing without express approval from each seller in the listing agreement about the existence of, and specific amount of, that offer of compensation.

CB Gundaker Buyer Services and Commissions

38. In addition to representing sellers, independent contractor sales associates affiliated with CB Gundaker represent buyers of residential properties. In connection with their representation of buyers, these independent contractor sales associates (i) locate residential properties for sale that meet their buyers' criteria, (ii) assist in negotiating terms and conditions for the purchase of a home that are acceptable to the buyer at multiple stages (including initial contracting, inspections, appraisals, and final closings), (iii) disclose in all offers on behalf of the buyer their representation of the buyer and the source or sources of compensation, (iv) abide by the terms of the agreement in which the buyer agreed to retain them, and (v) importantly, educate and advise the buyers on the many facets of the home buying process throughout the entire process.

39. Although buyers who retain agents to help them with their home purchase may conduct their own searches to independently find listings on websites, many buyers rely primarily on their agents to locate potential homes that may be of interest and provide guidance and education throughout the home buying experience. Even where buyers conduct their own searches and find a home of interest, their agents usually will (i) research the home, (ii) use their expertise and research to advise whether the list price represents a fair market value or could be lowered through negotiations, (iii) offer recommendations about whether to view the home, (iv)

work with the buyer to make an appropriate offer; (v) handle negotiations of the offered purchase price; (vi) negotiate with the seller's agent to resolve issues of concern to the buyer, such as home repairs or other things that may arise (including appraisal and finance issues) that may prevent the transaction from closing or otherwise slow down the process. Thus, a buyer's agent often will perform a significant amount of work on behalf of buyers, even when the buyer is the one who actually identifies the house he or she ultimately purchases.

40. Many services provided by buyer agents benefit and have value to sellers in real estate transactions. For instance, buyer agents work to ensure buyers are ready, willing, and able to obtain financing where necessary to purchase a home; this benefits sellers by avoiding potential delays in closing transactions. Similarly, sellers benefit from buyer agents' work to ensure buyers are viewing houses they are serious about potentially purchasing and financially qualified to purchase, and buyer agents' experience in advising buyers about the steps needed to close a real estate transaction as seamlessly as possible.

41. CB Gundaker's agreements to represent buyers of residential properties disclose how CB Gundaker will receive compensation. In addition to disclosing to their clients that they may receive compensation from a listing broker, in many instances buyer brokers discuss the manner in which they may be compensated directly from their buyer clients. The buyer broker agreements also specify that if the buyer broker is paid a commission by the seller or listing broker, the buyer will nevertheless pay the buyer broker a commission of [REDACTED], and that the buyer broker will otherwise accept the commission paid by the seller or listing broker as the balance of the buyer brokerage commission due under the agreement.

42. CB Gundaker's buyer broker agreements also provide that buyers will not owe any commission to their agents if they do not buy a home. As with listing agents, it is thus

common for buyer agents to spend many hours working for home buyers for which they ultimately remain uncompensated, because, for example, the buyers change their mind about purchasing a home, decide to use another agent, or no house available for sale meets the buyer's requirements.

43. In my experience and in transactions I have observed, in many cases, buyers cannot afford to purchase residential properties without financing. Buyers who require financing to purchase a house thus may benefit from having the seller pay the buyer broker commission. This is especially true for first-time home buyers, who account for approximately thirty percent of home buyers currently. Having the seller pay the buyer broker may enable buyers to have more cash on hand for a down payment, which then might give a buyer greater purchasing power, thereby expanding the list of potential home purchase options, or it may allow a buyer to pay a higher purchase price than they otherwise could, potentially leading to greater revenue for the seller.

44. CB Gundaker has no policy or practice of permitting independent contractor sales associates who are affiliated with CB Gundaker to steer prospective home buyers to properties or away from properties based on the amount of cooperative compensation offered by home sellers. To determine whether steering occurred in any particular real estate transaction would require a close examination of each buyer agent's conduct in showing (or not showing), based on the amount of compensation offered to the buyer broker in the MLS listing, homes to buyers that met the buyers' criteria.

45. CB Gundaker expects the independent contractor sales associates who are affiliated with CB Gundaker to act in the best interests of their clients. In my view and experience, steering by buyer agents based on the level of compensation displayed in an MLS

listing would be unusual and contrary to CB Gundaker's expectations that all independent contractor sales associates affiliated with CB Gundaker place the buyer's best interests above their own business interests.


MLS Data Often Do Not Reflect the Actual Final Buyer Broker Compensation

46. The offer of compensation included in CB Gundaker MLS listings frequently differs from the actual compensation that is ultimately paid to the broker representing the buyer who purchased the residential property. This can happen for any number of reasons, including further negotiations up until the time of closing, and a wide array of commission concessions made by agents in order to enable the transaction between buyers and sellers to close.

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Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: 11/11/2021



James Dohr